

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EARL HARRIS,

Defendant-Appellant.

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UNPUBLISHED

June 17, 1997

No. 195073

Ingham Circuit Court

LC No. 95-069461-FC

Before: MacKenzie, P.J., and Neff and Markey, JJ.

PER CURIAM.

Pursuant to a plea agreement, defendant pleaded guilty to conspiracy to break and enter an occupied dwelling with the intent to commit a larceny, MCL 750.110; MSA 28.305 and MCL 750.157a; MSA 28.354(1), carrying a concealed weapon in a vehicle (CCW), MCL 750.227; MSA 28.424, and second-degree murder, MCL 750.317; MSA 28.549. In exchange, charges of felony-murder and felony-firearm were dismissed. Defendant was sentenced to concurrent terms of ten to fifteen years for the conspiracy conviction, three to five years for the CCW conviction, and fifteen to forty years for the second-degree murder conviction. He now appeals as of right. We affirm.

On April 19, 1993, defendant, Antoine Wallace, Mark T. Howell, Thaddeas Hill, and Joseph Parker decided to break into an apartment and steal a safe. At least three of the men packed guns in case someone was inside. The five men drove to the apartment, where defendant kicked in the door and three others rushed in with their guns drawn. They discovered Justin Norwood in the apartment, and some of the group held a gun on Norwood while others, including defendant, searched for money. Defendant found a bank in a bedroom closet and then ran from the apartment. Hill, however, returned to the apartment and killed Norwood by shooting him once in the head.

Defendant first argues that his counsel was ineffective because he failed to explain defendant's situation sufficiently for defendant to make an informed and voluntary decision to plead guilty.

To establish ineffective assistance of counsel in the context of a guilty plea, courts must determine whether the defendant tendered a plea voluntarily and understandingly.

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Guilty pleas have been found to be involuntary or unknowing on the basis of ineffective assistance of counsel where defense counsel failed to explain adequately the nature of the charges or the consequences of the guilty plea. . . . Guilty pleas have also been found to be involuntary or unknowing where counsel has failed to discuss possible defenses to the charges to which the defendant is pleading guilty. . . . In these situations, counsel's deficient representation effectively renders the defendant's guilty plea involuntary because it deprives the defendant of the ability to make an intelligent and informed choice from among his alternative courses of action. [*People v Corteway*, 212 Mich App 442, 445; 538 NW2d 60 (1995).]

Because defendant did not create a record of counsel's deficiencies at an evidentiary hearing below, this Court's review is limited to the record before us. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). At the plea hearing, defendant said that he knew and understood the charges and the consequences of accepting the prosecution's offer of a plea agreement. He said that he had not been threatened, coerced, or promised anything not included in the plea agreement. Thus, the record below indicates that defendant knowingly and voluntarily accepted the plea agreement. *Corteway*, *supra*, p 445. The record does not support defendant's claim of ineffective assistance of counsel. *Id.* We decline to address defendant's contention that an affidavit attached to his brief on appeal supports his claim of ineffective assistance of counsel. Because the assertions in the affidavit were not made part of the record, they are not properly before us. *Hedelsky*, *supra*, p 387.

Defendant next claims that he should be allowed to withdraw his guilty plea because there was an insufficient factual basis for the plea. However, defendant did not preserve this issue in a conditional plea. *People v Beasley*, 198 Mich App 40, 43; 497 NW2d 200 (1993). Further, because defendant failed to move to withdraw his plea in the trial court, this issue is waived on appeal. *Id.*

Defendant also argues that his sentence violates the principle of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Defendant asserts that his conduct was not the most serious on the continuum of criminal behavior and that the court ignored certain mitigating circumstances, i.e., that defendant had almost no criminal record, was a high school graduate and was employed. Appellate review of sentencing is limited to the question of whether the sentencing court abused its discretion. *Id.*, pp 634-635. A sentencing court abuses its discretion by violating the principle of proportionality, which requires that a sentence be proportionate to the seriousness of the crime and the defendant's prior record. *Id.*, pp 635-636.

Defendant's sentence for second-degree murder was within the sentencing guidelines' recommended range and is therefore presumptively proportionate. *People v Broden*, 428 Mich 343; 408 NW2d 789 (1987). Defendant's sentences for conspiracy and carrying a concealed weapon were outside the range of the sentencing guidelines' minimum ranges. Since defendant's sentences are to run concurrently, and since his sentence for the most serious offense – second-degree murder – is proportionate, his arguments regarding his lesser sentences are moot. However, we note that defendant's conduct in this case was very serious. Although he did not carry a weapon, did not shoot

anyone, and was not present when the homicide occurred, he entered into a conspiracy during which these events occurred. Accordingly, defendant may be held accountable as if he had committed each of these acts. *People v Meredith (On Remand)*, 209 Mich App 403, 412; 531 NW2d 749 (1995). Moreover, as the sentencing court indicated, defendant knew that several of the others had guns, that Norwood was in the apartment, and that there was a chance that someone could be injured or killed. Yet, defendant did nothing to withdraw from the conspiracy or to stop his coconspirators from harming Norwood. This behavior was much more serious than, as defendant contends, simply conspiring to break and enter Norwood's apartment. Finally, the court did not ignore the mitigating circumstances that defendant had little criminal history, was a high school graduate, and was employed. Rather, the court addressed these factors with approval and found that serious aggravating circumstances also existed. The sentence imposed did not violate the principle of proportionality.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Janet T. Neff

/s/ Jane E. Markey